IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 20.06.2008

CORAM:

THE HONOURABLE MR. JUSTICE G.RAJASURIA

A.S.Nos.811 of 1988 and Tr.A.S.No.1255 of 1989

A.S.No.811 of 1988
Kotteeswaran (died)
2.Sundarambal
3.Jayayasakan
4.Jayadinakaran
(A2 to A4 brought on record
as LRs as per order dated
16.3.04 in CMP 16026/01) ... Appellants

Vs.

1.K.A.Subramaniam
2.Seeranga Gounder
... Respondents

Appeal against the judgment and decree of the Subordiante Judge, Sankagiri made in O.S.No.677 of 1995 dated 25.03.1988
Tr.A.S.No.1255 of 1989
Kotteeswaran (died)
2. Sundarambal
3. Jayayasakan
4. Jayadinakaran
(A2 to A4 brought on record
as LRs as per order dated
16.3.04 in CMP 15271/01) ... Appellants

Vs.

1.Seeranga Gounder alias Chinnapaiyan
2.K.A.Subramaniam
... Respondents

Appeal against the judgment and decree of the Subordiante Judge, Sankagiri made in O.S.No.196 of 1987 dated 25.03.1988.

For appellant :: Mr.R.M.Krishna Raju

For Respondents :: Mr.U.Srinivasan
(R1 in AS 811/88 AND
R2 in AS 1255/89)

Mr.N.Manokaran
(R2 in AS 811/99 AND
R1 in AS.1255/89)

JUDGMENT
The appeals are focussed as against the common judgment and decrees passed in O.S.No.677 of 1995 and O.S.No.196 of 1987 dated 25.03.1988 by the learned Sub Judge, Sankagiri. For convenience sake, the parties are referred to here under according to their litigative status before the trial Court.

2. Heard the learned counsel appearing for the parties.

3. Niggard and bereft of details, the case of the plaintiff in O.S.No.62 of 1985 on the file of District Munsif Court, Thiruchengode and subsequently transferred to Sub Court, Sankagiri and renumbered as O.S.No.196 of 1987, as could be understood from the plaint would run thus:-

Sreeranga Goundar @ Chinnapaiyan filed the said suit in O.S.No.62 of 1985 as against his son D3, Arunachalam and D-2 Kotteswaran, the decree holder and D-1 Subramaniam, the auction purchaser of the suit property on the main ground that the suit property was originally purchased by the plaintiff herein along with one other person vide sale deed Ex.A.1 dated 13.3.1946; subsequently, as per Ex.A.2, partition deed dated 07.04.1958, those purchasers got the property divided, where under the suit property was allotted to the share of the plaintiff herein Sreeranga Gounder; whileso, D-2 Kotteswran, the decree holder in his suit, as against Arunuchalam for recovery of money, brought the suit property belonging to the plaintiff Sreeranga Gounder in the Court auction sale, in which D-1 Subramaniam was the successful bidder and he purchased the alleged undivided half share of Arunachalam as though the suit property belonged to Sreeranga Gounder and Arunachalam; Sreeranga Gounder, the plaintiff was not aware of those proceeding's and subsequently when he came to know of it, he filed the suit for declaration declaring that he was the absolute owner of the property and for consequential injunction restraining the defendants' from disturbing his possession. D-1 auction purchaser remained exparte.

4. D-2 Kotteeswaran, the decree holder denying and refuting, challenging and impugning the allegations/averments in the plaint, filed the written statement, the gist and kernel of it would run thus:

D-2, being the decree holder, brought for sale the undivided half share of D-3, the Judgment Debtor in the suit property and it was properly auctioned in favour of D-1. The plaintiff was not the absolute owner of the suit property. In fact, the plaintiff and D-3 colluded together and filed the said suit. The executing Court recorded the delivery in accordance with law. The plaintiff despite knowing all these proceedings simply kept quiet and as such the suit filed by him is untenable.

5. D-3 Arunachalam son of the plaintiff filed the written statement. The pith and marrow of it would run thus:-
D-3 had no right over the suit property, which was brought for sale and as such the auction purchaser could not have got any title to D-3's alleged undivided share in the property. D-3 was ignorant of the execution proceedings.

6. However, D-1 in the aforesaid suit in O.S.No.62 of 1985 on the file of District Munsif Court, Thiruchengode which was subsequently transferred to Sub Court, Sankagiri and renumbered as

O.S.No.196 of 1987, filed a separate suit in O.S.No.677 of 1985 for cancelling the sale certificate and for recovery of the money paid by him under such illegal sale effected in the EP proceedings concerned. The gist and kernel of the averments in the plaint of Subramaniam in O.S.No.677 of 1985 is virtually on par with the averments as found set out in the pliant of Sreeranga Gounder in O.S.No.62 of 1985. D-2, the decree holder filed the written statement in O.S.No.677 of 1986 on the same line as in the written statement filed in O.S.No.196 of 1987 (O.S.No.62 of 1985) as set out supra.

7. The lower Court framed the relevant issues in both the suits and a joint trial was conducted. During trial, no oral evidence was adduced on either side. On consent Exs.A1 to A12 were marked on Sreeranga Gounder's side. On the other side, Exs.B.1 to B.5 were also marked on the defendants' side.

8. The trial Court ultimately decreed both the suits with the finding that the suit property which was sold in auction sale was not the joint family property of Sreeranga Gounder and his son and on that ground decreed the suits.

9. Being aggrieved by and dissatisfied with the common judgment and decree of the trial Court, these two appeals have been filed by Koteeswaran, who is D-2 in O.S.No.62 of 1985 (renumbered as O.S.No.196 of 1987) and D-1 in O.S.No.677 of 1985. The grounds of appeal in both the appeals would run thus:-

The common judgment and decrees of the trial court is against law, weight of evidence and probabilities of the case. The trial court committed error in arriving at the conclusion that the suit property happened to be a self acquired property of Sreeranga Gounder and the reasons set out in the judgment of the trial Court is against law.

10. The points for consideration are as under:-
1) Whether the trial Court was justified in deciding the matter without entertaining any oral evidence relating to the factum of existence or otherwise of the Hindu Joint Family?
2) Whether there is any infirmity in the common Judgment and the decrees of the trial Court?

11. At the time of hearing, it transpired that the documents were marked during the trial by consent. It is a trite proposition of law that mere marking will not amount to proving the documents. The bone of contention of Sreeranga Gounder was that the suit property was purchased as per Ex.A1 by Sreeranga Gounder and one other person jointly, subsequently, they got it partitioned as per Ex.A.2 and Ex.B.4 the mortgage deed executed by Sreeranga Gounder along with his sons would not in any way enure to the benefit of the appellant herein to contend that the suit property was treated as joint family property, as putforth by abundant caution only, the sons of Sreeranga Gounder also signed the mortage deed. The contention of the appellant is that there should have been evidence in that regard. Ex.B.4 is a registered document, which would clearly demonstrate that Sreeranga Gounder and his two major sons viz., Ramasamy and Arunachalam signed as though they are the joint owners of the property concerned. Incidentally, at this juncture, I would like to point out that even though in Ex.B.4 three persons were named as joint owners, nevertheless, it is not known as to how the decree holder ignoring such fact simply at the time of bringing the suit property for sale projected the case as though Arunachalam the Judgment Debtor had half share in the suit property. If really the suit property happened to be the joint property of Sreeranga Gounder and his two sons, then, Arunachalam would be having only one third share. But curiously enough half share in the suit property was brought for sale in the EP proceedings ignoring these facts. Now it transpires that Sreeranga Gounder died during the pendency of these appeals and hence his legal representatives viz., his wife, his son, Ramasamy Gounder and his grand son born to Ramasamy, were added. The

fact remains that the said defendant Arunachalam in both the suits died during the pendency of the suits, however he remained exparte in those suits, presumably on that ground only it appears that his legal representatives were not added.

12. Be that as it may, the crucial point which arises is as to whether the plaintiff Sreeranga Gounder in one suit and Subramaniam in one other suit were justified in not figuring as witnesses so as to speak about the facts and details relating to this case. My mind is redolent with the decision of the Apex Court reported in the case of Vidhyadhar vs. Mankikrao reported in AIR 1999 SC 1441, the excerpt of the same would run thus:-
"15. It was defendant No.1 who contended that the sale deed, executed by defendant NO.2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs.500/- were paid as sale consideration to defendant No.2. He further claimed that payment of Rs.4,500/- to defendant No.2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No.1 as he did not enter into the witness box. He did not State the facts pleaded in the written statement on oath in the trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No.2 and the plaintiff was a bogus transaction.

16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbaksha Singh vs. Gurdial Singh, AIR 1927 PC 230. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh, AIR 1930 Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh, AIR 1931 Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat, AIR 1970 Madh Pra 225, also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (AIR 1927 PC 230) (supra). The Allahabad High Court in Arjun Singh v. Virender Nath, AIR 1971 Allahabad 29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand, AIR 1974 Punj and Har 7, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box".

13. A perusal of the aforesaid decision would clearly highlight and spot light that when certain facts are within the exclusive knowledge of the plaintiff, it is the bounden duty of him to appear before the Court and depose and in the absence of it, the genuineness of the plaintiff case cannot be held to have been proved. But, in this case, even though Ex.B.4 a registered mortgage deed emerged in the name of Sreeranga Gounder and his sons viz., Ramasamy and Arunachalam as joint owners/co-mortgagors, the said Sreeranga Gounder had not figured himself as a witness to prove that he happened to be the exclusive owner of the suit property. It is just and necessary to highlight the significance of Section 91 and 92 of the Indian Evidence Act, which would shun oral evidence being adduced quite contrary to the recitals in a registered deed. However, in certain circumstances, evidence could be adduced to prove the actuals. But all those facts could be expatiated only by the person concerned by figuring himself as a witness. Whether joint family existed or not among Sreeranga Gounder and his two sons is a fact should have been known to Sreeranga Gounder. But he never appeared before the Court and deposed and no steps have been taken by any of the parties to summon Sreeranga Gounder as a Court witness. Even the Judgment Debtor Arunachalam at the relevant time during the earlier proceedings was very much alive but he remained exparte. The auction purchaser Subramamaniam in his suit even though had come forward with the specific plea that the Judgment Debtor had no soleable interest in the suit property, nonetheless, he had not figured himself as a witness. These are all in my opinion serious flaws in the proceedings conducted

before the trial Court. No doubt, the trial Court extracted an excerpt from treatise on the Hindu Law to the effect that simply because the mortgage deed was signed by the father and sons, there could be no presumption that there existed a joint family. The opinion found in the treatise is not conclusive and it is not to the effect that such deeds have no evidentiary value at all to prove joint family status. It cannot be taken that when father and sons have executed the mortgage deed, it should necessarily be taken that there was no joint family status. It all depends upon the facts and circumstances involved in each and every case. The trial Court simply relying on the excerpt from the said treatise, ignored Ex.B.4 and placed reliance only on Exs.A1 and A2 and decreed the suit. In my opinion, the approach of the trial Court was perverse and the parties also were not justified in refraining from adducing oral evidence to highlight crucial circumstances relating to this case. The nature of the pleas involved in both the cases warrant clinching and reliable oral evidence. In the absence of such evidence, necessarily the Judgment and decree of the trial Court should be set aside and the matter should be remanded back to the trial Court for being dealt with as per law from the stage of conducting of trial.

14. In view of the discussions set out supra, both the appeals are decided by setting aside the common Judgment and decrees of the trial Court and in remanding both the matters to the trial Court for being dealt with as per law. The parties are directed to appear before the trial Court on 30.07.2008.

15. The learned counsel appearing for the parties would highlight that the earlier the Sub Court Sankagiri had jurisdiction. Consequent upon the amendment to the Civil Courts Act, the District Munsif Court, Tiruchengode now is having jurisdiction and hence the District Munsif, Tiruchengode shall deal with the matters as per law within a period of six months from the date of receipt of records. However, there shall be no order as to costs.

16. The Registry is directed to send back the records immediately. The court fee paid by the appellant in both the appeals are directed to be refunded to the appellant.

20.06.2008
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Index : Yes/
Internet: Yes/

To

The District Munsif Court,
Tiruchengode

G.RAJASURIA,J.,
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Judgment in
A.S.Nos.811 of 1988
and Tr.A.S.No.1255 of 1989

20.06.2008